THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

Case No: CC 23/2018

In the matter between

THE STATE

and

HORATIO SOLOMON	**ACCUSED 1**
ISMAIL OCKERTS	**ACCUSED** 2
BRIAN FIEGHLAND	**ACCUSED 3**
ISHMAEEL OCKERTS	**ACCUSED 4**
ELTON ELY	**ACCUSED 5**
BRENT CAMPBELL	**ACCUSED 6**
BRADLEY ROBERTS	**ACCUSED 7**
LEZAY BOOYSEN	**ACCUSED 8**
FABIAN CONSTABLE	**ACCUSED 9**
ZIYAAD SAFODIEN	**ACCUSED 10**
KEENAN KRUGER	**ACCUSED 11**
LUCIAN CONSUL	**ACCUSED 12**

Coram: Rogers J
Heard: 7 October 2020
Delivered: 12 October 2020

SENTENCE

Rogers J:

[1] This is my judgment on sentence, following the convictions handed down on 28 September 2020. No evidence was led in mitigation or aggravation. The accused's legal representatives made *ex parte* statements on their behalf.

No 1 and No 2

No 1

[2] No 1 was born on 13 April 1989, so he is now 31. He grew up in Delft and passed Grade 12. Before his arrest he was self-employed, buying and selling cars, running his mother's taxi business, and selling fish, fruit and vegetables. He owns three immovable properties, situated in Roosendal (Delft), Belhar Ext 13 and Kleinmond. He also owns a restored 1978 Ford Cortina.

[3] He is unmarried. He is the father of seven children and before his arrest also cared for two other children. His mother is unwell, suffering from […].

[4] He was in custody awaiting trial over the period 22 August 2017 – 6 December 2019, a period of just under two years and four months. He was then released on bail. On 13 May 2020 his bail was revoked due to breach of bail conditions, and he has remained in custody since then. However, Mr Liddell did not ask that this later period of custody be taken into account.

No 2

[5] No 2 was born on 30 August 1990, so he is now 30. He grew up in Kalksteenfontein. He passed Grade 8 and left school during Grade 9. He moved with his family to St Helena Bay in 2010 for about three years. In 2013 he and his family moved back to Wesbank.

[6] He is a home-taught mechanic, having learnt this trade from his uncle. He later started working for himself, repairing cars.

[7] No 2 has been in custody awaiting trial since his arrest on 22 August 2017, a period of just under three years and two months.

Remorse and rehabilitation

[8] No 1 and No 2 have not expressed remorse for their actions. They continue to protest their innocence. As far as I know, they still deny having ever belonged to the Terrible Josters. The absence of remorse is not an aggravating factor, though its presence, if genuine, might have been a mitigating factor.

[9] As to rehabilitation, this is not something one would ever wish to rule out. However, the accused have not taken the court into their confidence. Taking responsibility for one's actions is the first step towards rehabilitation. The accused have not yet taken that step, and whether they will ever do so is unknown.

Gang culture

[10] Since the accused do not admit their crimes and membership of the Terrible Josters, their counsel understandably did not advance, as a mitigating factor, that the accused had grown up in a world in which gangs were prevalent. In *S v Jordaan & others* [2018] ZAWCHC 10, Binns-Ward J observed (para 4) that the gang culture in which some young men grow up may mean that one's 'moral condemnation' of such men's crimes 'must be measured'. With reference to the two accused in his case, the learned judge said:

> 'They are, each of them, persons against whom the odds have been stacked from the outset, which in a material sense is an indictment of our far from perfect society. Recognising these factors, however, does not afford proper reason for the adoption by the court of an attitude of maudlin sympathy for them in regard to the very serious offences in which they involved themselves. They knew that what they were doing was criminal and they must be held appropriately accountable for their wrongdoing. Society in general, and the law-abiding members of their own community, would be grievously let down if the court were not to mark their misdeeds with the gravity they deserve.'

[11] To what the learned judge said I would add two observations. First, s 10(3) of POCA requires gang membership to be treated as an aggravating factor in crimes committed by gang members. Second, on the facts of this case, there is no evidence that these two accused were vulnerable youngsters sucked into a gang world by peer pressure. No 1 has a matric. His parents were able to provide him with a stable home. He had the ability to earn a lawful living. While

No 2's school career was less satisfactory, he too seems to have had the support of a family, and learnt a trade.

Counts 35 and 36

[12] No 1 and No 2 have been convicted of the murder of Vernon Botes and the attempted murder of Herbert du Plooy. I have found that the murder was premeditated and planned, and that it was committed by two or more persons acting in the execution or furtherance of a common purpose. In terms of s 51(1) of Act 105 of 1997 the prescribed minimum sentence on the murder count is life imprisonment unless there are substantial and compelling circumstances to impose a lesser sentence.

[13] Mr Menigo reminded me of what I said, with reference to leading authorities, when passing sentence in *S v Petersen & another* [2017] ZAWCHC 32 paras 4-6. Since the principles have not changed, I take the liberty of repeating them in the next three paragraphs.

[14] The approach to the question whether substantial and compelling circumstances exist is the one laid down in *S v Malgas* 2001 (1) SACR 469 (SCA), which has been consistently followed. In terms of that case the factors to be considered in determining whether substantial and compelling circumstances exist are all the factors traditionally taken into account in assessing an appropriate sentence, bearing in mind, however, that it is no longer 'business as usual' and that the emphasis has shifted to the objective gravity of the crime and the need for effective sanctions. If, after considering all relevant sentencing factors, the court has not merely a sense of unease but a conviction that injustice will be done if the prescribed sentence is imposed or (to put it differently) that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to depart from the prescribed sentence.

[15] The Supreme Court of Appeal has emphasised, however, that a trial court should not base a finding of substantial and compelling circumstances on flimsy or speculative grounds or hypotheses (see, eg *S v PB* 2011 (1) SACR 448 (SCA) paras 9-10 and the passages there quoted). In *Malgas* it was said that the lawmaker has ordained that 'ordinarily and in the absence of weighty justification' the prescribed sentence should be imposed. Unless there are 'truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts' (para 25).

[16] In determining whether an injustice would arise from the imposition of the prescribed sentence, the customary sentencing considerations which come into play are the well-known triad comprising the offender, the offence and the interests of society. These three factors in turn require a court to bear in mind the varying purposes served by criminal punishment, namely deterrence, prevention, retribution and rehabilitation. Nevertheless, and in respect of crimes dealt with in the Act, the type of sentence to which these considerations point should not be assessed as if the Act had not been enacted. As was observed by Cameron JA in *S v Abrahams* 2002 (1) SACR 116 (SCA) at para 25 the Act 'creates a legislative standard that weighs upon the exercise of the sentencing court's discretion', so that even where there are substantial and compelling circumstances one should expect discretionary sentences to be more severe than before.

[17] No 1 and No 2 were 25 and 23 years old respectively when these crimes were committed. Although they were young men, they were of an age where immaturity would not be presumed. In *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo & Others* 2009 (2) SACR 361 (SCA) the fact that the appellants were aged between 20 and 22 at the time of the premeditated murder was not regarded, on its own or with other factors, as constituting substantial and compelling circumstances. The court said that none of them demonstrated immaturity and that there was no evidence of peer pressure. In S v *Matyityi* 2011 (1) SACR 40 (SCA) Ponnan JA was critical of a trial judge's use of the phrase 'relative youthfulness' without any attempt at defining what exactly that meant in respect of the particular individual. The learned judge of appeal said that while someone under the age of 18 years could be regarded as naturally immature, the same does not hold true for an adult and that a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor

[18] Neither accused has a previous conviction for violent crime. However, s 51(1), unlike s 51(2), does not draw a distinction between first and multiple offenders. The fact that an accused is a first offender may, in combination with other factors, lead a court to the conclusion that life imprisonment would be disproportionate punishment, but on its own it cannot have that effect.

[19] Although the accused did not directly perpetrate the murder and attempted murder, I cannot find that this reduces their culpability. No 1, and No 2 as his close associate, were senior

figures in the Terrible Josters. It is known that in the gang world, direct perpetration is often left to underlings. Where more senior figures are jointly responsible with those who actually execute shootings, their culpability is at least as great as that of the shooters. In terms of s 10(3) of POCA, the accused's membership of the Terrible Josters is an aggravating circumstance, as is the fact that the crimes were committed with a firearm and ammunition which they knew to be unlawfully possessed by the shooter. They have expressed no remorse.

[20] The fact that the accused have children is a personal circumstance which must necessarily recede into the background. This is not a case where an accused's responsibility for his children might tilt the balance in favour of a non-custodial sentence. On any reckoning, the accused will be sent to prison for a long time.

[21] Subject to the question of time spent in custody awaiting trial, I can find no mitigating circumstances. In regard to the accused's pre-sentencing detention, the court in *Radebe* 2013 (2) SACR 161 (SCA) said that there was no fixed or mechanical rule for accounting for time spent awaiting trial. Lewis JA disapproved of an automatic deduction of any kind, let alone one based on double the period spent awaiting trial. Pre-sentencing detention is but one of the factors to be weighed in determining whether the effective period imposed is justified. The conditions affecting the accused in prison and the reasons for the prolonged period can be taken into account. In *Radebe* itself, where the appellants had spent two years and four months in custody awaiting trial, the Supreme Court of Appeal held that, all things considered, the prescribed minimum sentence of 15 years' imprisonment was not disproportionate, and no deduction was made

[22] In *Ngcobo supra* the accused argued that a two and a half year period awaiting trial should count in their favour. On appeal by the State, the Supreme Court of Appeal set aside an 18-year sentence for murder and replaced it with the prescribed life sentence. With reference to the awaiting-trial period, Navsa JA observed that the accused had maintained their innocence throughout the trial and sentencing proceedings, which necessitated the leading of extensive evidence.

[23] Neither the State nor the accused were at fault insofar as the trial's duration is concerned. This was a big case. In the circumstances, it was brought to trial reasonably promptly, and was conducted efficiently both by the prosecution and the defence. To some

extent the trial was lengthened by the fact that the accused maintained their innocence on the counts for which they have been convicted. On the other hand, a large part of the trial was taken up with charges of which they have been acquitted.

[24] Where a court imposing a determinate sentence considers that pre-sentencing detention should be taken into account, the general trend is to deduct an equivalent period from what would otherwise have been an appropriate sentence. However, and as Goosen J explained in *S v Kammies & another* [2019] ZAECPEHC 86 paras 34-49, this approach presents conceptual difficulty when life imprisonment is the prescribed sentence and there are no other circumstances justifying a departure from the statutorily ordained sentence. That was the position in *Kammies*, where the accused had spent three years in custody awaiting trial. Goosen J considered that *Radebe* was authority for the proposition that time spent awaiting trial can never on its own be a substantial and compelling circumstance. It was not permissible, furthermore, to attempt to account for pre-sentencing detention by having regard to the 'parole exclusion period' (ie the period the offender must serve before being considered for parole – usually 25 years in the case of a life sentence). He concluded that since there was no rational way in which to take the pre-sentencing detention into account, he was required to impose life imprisonment.

[25] I do not read *Radebe* as holding that pre-sentencing detention can never on its own be a substantial and compelling circumstance justifying departure from a prescribed minimum sentence. In *Radebe* the prescribed minimum sentence of 15 years' imprisonment was held to be justified because the period spent awaiting trial did not outweigh the aggravating factors (para 18). However, the court in *Radebe* was not concerned with a prescribed life sentence, where, for the reasons stated by Goosen J, it is conceptually difficult to take account of pre-sentencing detention and to place it in the scales against other factors.

[26] In my view, the reason why pre-sentencing detention on its own should not (at least ordinarily) be regarded as a substantial and compelling circumstance to depart from a prescribed life sentence lies in the implications of what Goosen J said in paras 38 and 39 of his judgment. A court must determine an appropriate sentence without regard to the parole exclusion period. The period actually imposed is what matters. Where an accused is arrested and kept in custody, pre-sentencing detention is concerned with the prejudice he suffers by virtue of the delay from the time he is arrested until the time he is sentenced. In the real world, there will always be a

delay, no matter how efficient the criminal justice system is. Nevertheless, where the court is concerned with a determinate sentence, one can assess the accused's prejudice by contrasting the actual position with a hypothetical scenario in which there was no delay between arrest and sentencing. In the hypothetical scenario, the accused would have started his sentence on the date he was arrested, and would thus have been released sooner.

[27] Where, however, the prescribed minimum sentence is life imprisonment, the sentence means imprisonment for as long as the accused is alive. Leaving aside, as one must, the prospect of parole, the accused would not have been released sooner on the hypothesis of no interval between arrest and sentencing.

[28] However, and even if this is not the right way of viewing the problem, I do not think, all things considered, that the pre-sentencing detention in the present case is so gross as to warrant a departure from the mandated life sentence on count 35, bearing in mind the aggravating features.

[29] Mr Liddell described the circumstances in which No 1 had been held in custody awaiting trial. Regrettably it may be true that the conditions are every bit as atrocious as Mr Liddell sketched. This is a grave administrative failing on the part of the prison authorities. The resultant violation of the constitutional rights of awaiting-trial prisoners may justify civil proceedings for a structural remedy, but there is little that a criminal court can do about it when it comes to sentencing.

[30] In respect of count 36, Mr Menigo referred me to Part IV of Schedule 2 to Act 105 of 1997, which lists, as one of the offences subject to a minimum sentence of five years' imprisonment, an offence 'involving an assault, when a dangerous wound is inflicted with a firearm, other than an offence referred to in Part I, II or III'. Although attempted murder by using a firearm would often fall within this definition, attempted murder of this kind would usually attract a heavier sentence.

[31] I have found that Du Plooy was an intended rather than an accidental victim of the shooting. He suffered multiple gunshot wounds, as described in para 79 of the judgment. It is unclear what lasting effects, if any, these wounds had. The crime was a serious one. In my view, it would ordinarily warrant imprisonment of 12 years. However, in view of the time spent in

custody awaiting trial, I shall reduce the sentences to nine years and eight months in the case of No 1, and eight years and ten months in the case of No 2. These sentences will, by operation of law, run concurrently with the life sentences.

Count 71 (drug dealing).

[32] The accused have been convicted of dealing in drugs, in violation of s 5(*b*). Since the value of the drugs was not proved, no prescribed minimum sentence applies. In terms of s 17(*e*) of the Drugs Act, the maximum sentence is 25 years' imprisonment, with or without a fine.

[33] No 1 and No 2 were 27 and 26 years old respectively at the time the crime was committed.

[34] The quantity of drugs was substantial (see para 205 of the conviction judgment). The accused were parcelling them up for distribution. Their membership of the Terrible Josters is, again, an aggravating factor in terms of s 10(3) of POCA.

[35] No 2 has one relevant previous conviction. On 18 February 2016 he was convicted of dealing in drugs in violation of s 5(*b*) of the Drugs Act and sentenced to five years' suspended imprisonment. The prior conviction is an aggravating factor, as is the fact that the drug-dealing crime in the present case was committed during the period of suspension. (Because the accused intend appealing their convictions, I have not been asked to consider bringing the suspended sentence into effect.)

[36] As is well known, drug dealing is a core activity of criminal gangs on the Cape Flats. Turf wars are a major source of violent conflict between gangs, in which innocent bystanders are not infrequently killed or injured. Drugs bring misery to users, who may become addicted. In the constant stream of automatic reviews which judges in this division are required to conduct of administrative orders for involuntary in-patient care of mental health users, substance-induced psychosis is one of the most common diagnoses. In automatic reviews of criminal sentences, judges all too often reads of young men and women who have turned to theft, housebreaking and robbery to feed their habit. In the end, the monetary proceeds of these crimes land up in the pockets of people such as the accused.

[37] In considering an appropriate sentence, I have had regard to the following cases:

- *S v Arias* 2002 (1) SACR 518 (W)/*Jimenez* 2002 (2) SACR 190 (W) (the same judgment, reported twice): First offender, age 24. Dealing in 60 bullets (653 gr) of cocaine worth R210,000. Smuggled by way of a swallowed condom. 12 years upheld on appeal. (This case refers to *S v Homareda* 1999 (2) SACR 319 (W) as establishing 10 years as the 'ordinary' sentence for this type of crime.) On further appeal, *S v Jimenez* 2003 (1) SACR 507 (SCA), the sentence was upheld even though the value and weight of the drugs were found not to have been proved. The SCA in para 6 referred to cases establishing an ordinary range of 5-10 years for this type of offence.)

- *S v Hammond* 2008 (1) SACR 476 (SCA). Dealing in methcathinone, 3,2 kgs. Entrapment. First offender. 5 years of which 2 years suspended.

- *S v Gamede* [2010] ZASCA 122. Manufacturing and dealing in 556 kg of mandrax. 40 year-old first offender. 20 years reduced to 15 years.

- *S v Keyser* 2012 (2) SACR 437 (SCA). First offender. Dealing in 6547 gr of cocaine. Arrested on a domestic flight, having just flown in from Brazil. Awaiting trial for 11 months. Showed no remorse. 20 years upheld.

- *S v Linus* 2015 (1) SACR 381 (GNP): Two counts dealing in methamphetamine (tik), quantity not stated. First offender. Sentence of 10 years upheld.

- *S v Umeh* 2015 (2) SACR 395 (WCC). First offender. Count 1 – dealing in tik (49,2 gr); Count 2 – dealing in cocaine and 1485 gr of methamphetamine (tik). Sentenced to 7 years and 15 years (concurrent).

- *S v Windvogel* [2015] ZASCA 63. Four counts of dealing in cocaine (3,1 gr, 3,8 gr, 9,5 gr and 4,8 gr). The quantities were small because this was a trapping operation. No relevant prior convictions. The SCA upheld 8 years on each count but made a concurrency order yielding an effective period of 20 years.

- *S v Klaas* 2018 (1) SACR 643 (CC). Manufacturing and dealing in 2920 tablets (mainly mandrax, some tik). 15 years set aside because State had not proved value of the drugs for purposes of triggering the minimum sentence. After a review of sentences for these types of offences, the Constitutional Court imposed 12 years.

[38] In my opinion, a just sentence for No 1 is nine years' imprisonment. Because of No 2's previous conviction and the timing of the current offence, I will impose 12 years' imprisonment on No 2. In both cases, the sentences will, by operation of law, run concurrently with the life sentences.

Count 2

[39] No 1 and No 2 have been convicted of contravening s 9(2)(*a*) of POCA, by performing acts aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity, such pattern being their participation in counts 35, 36 and 71. In terms of s 10(1)(*a*), the maximum penalty is a fine or imprisonment not exceeding six years.

[40] Since in this case the accused have been convicted of, and will be punished for, the crimes constituting the pattern of criminal gang activity, and since their gang membership has been treated as an aggravating feature in terms of s 10(3), it seems to me that their separate punishment on count 2 should be modest. I regard three years' imprisonment as just. If I were not imposing a life sentence on count 35, I would have ordered the sentence on count 2 to run concurrently with the determinate sentences. Such concurrency will, however, be automatic because of the life sentences.

No 9

[41] No 9 has been convicted on counts 14-17, being two counts of attempted murder and counts for the unlawful possession of a firearm and ammunition. The attempted murder of the youngster, Liam Andreas, carries a minimum sentence of 10 years' imprisonment in terms of Part III of Schedule 2 of Act 105 of 1997, because it involved an assault with intent to do grievous bodily harm on a child under the age of 16 years.

[42] No 9's personal circumstances are as follows. He was born on 19 August 1992, so he is now 28. He grew up in Belhar. He left school after completing Grade 7. He was employed at Prestige in the months preceding his arrest. He has been in a relationship with Ms Carol Roberts for some years. They have a three and a half year old daughter.

[43] No 9 has no relevant previous convictions. He continues to protest his innocence on the counts of which he was convicted, so remorse is not a factor in his favour.

[44] He was initially arrested for these crimes in September 2012 and spent two months in custody before being released on bail. He was arrested again on 23 August 2017 and has been in custody since then – a further period of just under three years and two months.

[45] No 9 was 20 years old when the crimes were committed. The evidence was that he was encouraged to shoot Brandon Dickson @Mablou by one or more gang members who were older than him. I will take his youthfulness, and his potential susceptibility to peer pressure, into account as a factor in his favour.

[46] The injuries suffered by the intended victim, Brandon Dickson @Mablou, and the unintended victim, [LA], are described in paras 39-40 of my judgment. In the event, the wounds seem not to have been life-threatening. In the case of Mablou, No 9 had the direct intent to kill him. No 9 may have succeeded but for the fact that he experienced a pistol jam in the alley. The crime was brazenly committed in broad daylight in a residential area. The accused fired a number of shots at Mablou while chasing him along several streets.

[47] Although [LA] was an unintended victim, No 9 was wilfully reckless regarding the safety of this youngster and other persons in the immediate vicinity. It is fortunate for [LA], and for No 9, that the youngster was not killed. The death of innocent bystanders, including children, is tragically a not uncommon occurrence in Cape Flats gang warfare.

[48] No 9's membership of the Terrible Josters is an aggravating feature in terms of s 10(3) of POCA.

[49] Leaving aside pre-sentencing detention, I consider that appropriate sentences – bearing in mind the accused's youthfulness and peer pressure – would be imprisonment of ten years and eight years respectively for the attempted murders of Mablou and Liam. In the case of [LA]'s attempted murder, the factors just mentioned, together with the circumstances that No 9's intent was in the form of *dolus eventualis* and that [LA] was not seriously injured, are substantial and compelling circumstances to deviate from the prescribed minimum sentence of 10 years' imprisonment.

[50] Since the sentences for the attempted murders reflect the gravity of the use of an unlicensed firearm, I would impose imprisonment of five years and three years respectively for

the unlawful possession of the firearm and ammunition, to run concurrently with the sentences for attempted murder.

[51] In the absence of further concurrency, the effective period of imprisonment would be 18 years, which would I think be too heavy for this young man, bearing in mind *inter alia* that he was engaged in a single criminal enterprise, even though it ended up having two victims. I do not think, though, that there should be complete concurrency. The message needs to go out that innocent bystanders, particularly children, are not mere ciphers. The community in general, and the […] family in particular, should not be left with the idea that young [LA]'s fate 'counts for nothing'. In the circumstances, I would order four years of the imprisonment on the second count of attempted murder to run concurrently with the sentence on the first count of attempted murder, yielding an effective period of imprisonment for all for crimes of 14 years.

[52] I do not intend to take account of pre-sentencing detention by an exactly equal reduction in the above effective sentence. All things considered, I regard an effective period of imprisonment of 11 years as doing justice to the case. I will achieve this by ordering seven years, rather than four years, of the imprisonment on the second count of attempted murder to run concurrently with the sentence on the first count of attempted murder.

No 10

[53] No 10 has been convicted on counts 59-62, being two counts of attempted murder and counts for the unlawful possession of a firearm and ammunition. Because the firearm used by No 10 was recovered, it could be analysed. One of the admitted exhibits is a ballistics report confirming that the firearm was a semi-automatic firearm as contemplated in Part II of Schedule 2 of Act 105 of 1997. Its possession thus attracts a minimum sentence of 15 years' imprisonment in the absence of substantial and compelling circumstances.

[54] No 10's personal circumstances are as follows. He was born on 14 August 1992, so he is now 28. He grew up in Delft. He completed Grade 10. His parents became divorced while he was in Grade 8. His father, who passed away last year, owned a taxi while his mother is unemployed. He has five brothers and three sisters. He is in a serious relationship with his girlfriend. They have children aged 5 and 3.

[55] After leaving school, he obtained work as an electrical assistant and eventually learnt enough skills to earn money as a self-employed electrician. It was in this capacity that he met No 1. In 2016 he obtained employment as an assistant trailer mechanic at the SAB depot in Stikland.

[56] He was arrested on 5 September 2017 and has thus been in custody awaiting trial for three years and one month.

[57] No 10 was 24 when the crimes were committed. In the absence of evidence of immaturity, youthfulness is not a factor in his favour. I refer to what I said earlier on this subject.

[58] No 10 has no relevant previous convictions. He continues to protest his innocence on the counts of which he was convicted, so remorse is not a factor in his favour.

[59] Regarding the crimes, at least one of the attempted murders was a direct attempt to kill the victim. No 10 shot at a group of three people, even though perhaps only one of them was his intended victim. He showed a wilful recklessness about the lives of the other two people in the group. His membership of the Terrible Josters is an aggravating feature in terms of s 10(3) of POCA. Quite apart from gang membership, gun violence is a scourge on the Cape Flats, and violence perpetrated with a firearm is rightly viewed in a very serious light. The crime was committed in broad daylight in a residential area.

[60] In the event, however, nobody was actually struck, and this necessarily counts, albeit fortuitously, in No 10's favour.

[61] In the circumstances, and leaving aside pre-sentencing detention, I think an appropriate sentence would be ten years' imprisonment on the first count of attempted murder (perpetrated with direct intent) and seven years' imprisonment on the second count of attempted murder, with five years on the second count to run concurrently with the sentence on the first count, resulting in an effective period of imprisonment of 12 years.

[62] Where an accused person is convicted of unlawful possession a semi-automatic firearm in circumstances where he is not simultaneously convicted of a crime in which the firearm was

used, the prescribed sentence of 15 years would be mandatory in the absence of any substantial and compelling circumstances. (*S v Jansen* 2020 (1) SACR 413 (ECG), one of the judgments cited by Mr Menigo, was such a case where a 15-year sentence was upheld on appeal, as was the full court's judgment in *S v Swartz* 2016 (2) SACR 268.) The mere fact that the firearm was not proved to have been used in a crime would not be such a circumstance. The lawmaker has mandated heavy sentences for unlawfully possessing semi-automatic firearms precisely because all too frequently the perpetrators of violent crimes in which unlicensed firearms are used go undetected; it is their potential for such use that justifies the heavy sentence (*Swartz* para 41).

[63] Where, however, the State proves no more than that the accused had possession of the semi-automatic weapon for purposes of committing a murder or attempted murder of which he is simultaneously convicted, the gravity of the accused's possession of the firearm is usually reflected in the sentence imposed for the murder or attempted murder. The present is such a case. In addition, the evidence at trial points to the likelihood that the Terrible Josters' weapons were under the control of leaders who authorised the weapons to be issued to underlings for use in specific hits. It has not been proved that No 10 had possession of the firearm except for the limited purpose of shooting at Theo de Kock.

[64] I thus consider that there are substantial and compelling circumstances to depart from the prescribed sentence of 15 years' imprisonment for possession of the firearm. Nevertheless, there must be some recognition for the fact that No 10 possessed a firearm which has been singled out by the lawmaker for special treatment. In the possession charges for which No 9, No 11 and No 12 have been convicted, the firearms were not recovered, so it was not proved beyond reasonable doubt that their firearms were semi-automatic. No 10's possession should thus attract a somewhat harsher penalty.

[65] I will thus impose six years' imprisonment for possession of the firearm, and three years' imprisonment for possession of the ammunition, such sentences, save for one year in the case of the firearm sentence, to run concurrently with the sentence on the first of the attempted murder counts. This increases the effective period of imprisonment to 13 years.

[66] I shall account for No 10's pre-sentencing detention by reducing the effective period of imprisonment to 10 years, which I will achieve by reducing the sentence on the first count of

attempted murder to 9 years and by directing the whole of the imprisonment on the second count of attempted murder to run concurrently with the sentence on the first count.

No 11 and No 12

[67] These two accused have been convicted of counts 55, 57 and 58 (the murder of George Stevens and the related counts of unlawful possession of firearms and ammunition); and of counts 67-70 (the murder of Victor Browers, the attempted murder of Shaakirah Undre, and the related counts of unlawful possession of firearms and ammunition). The two murder counts attract a minimum life sentence because they were both committed by two or more persons in the furtherance or execution of a common purpose, and because the Browers murder was also planned and premeditated.

No 11

[68] No 11's personal circumstances are the following. He was born on 4 April 1995, so he is now 25 years old. He grew up in Erica Estate, Elsies River. He is unmarried and has no children. He completed Grade 9. In 2012 he entered full-time employment with Kwikspace (prefab building work). He worked there full-time. From the beginning of 2013 until his arrest in another case in November 2013, he worked at the Cape Town docks as a checker of produce being loaded for export. He worked three days per week, not weekends.

[69] No 11 was arrested on 8 February 2018 in the present case. In July 2018 he was sentenced in another case to eight years' imprisonment for attempted murder, so he spent about five months awaiting trial in the present case before becoming a sentenced offender.

No 12

[70] No 12's personal circumstances are the following. He was born on 4 May 1996, so he is now 24 years old. He also grew up in Elsies River. He passed Grade 9 and left school during Grade 10. He is unmarried and has no children. He was unemployed at the time of his arrest, and no information has been given to me about an employment history.

[71] No 12 was arrested in the present case on 8 February 2018 so has spent two years and eight months in custody awaiting trial. He has no relevant previous convictions.

Youthfulness?

[72] No 11 had just turned 21 at the time of Stevens' murder but was nearly 22 at the time of Browers' murder. Having regard to the cases I mentioned earlier on the subject of youthfulness, and having regard further to the fact that No 11 entered the job market three to four years before he perpetrated the crimes for which I have convicted him, he does not have any claim to be treated as an immature person who should not bear the full consequences of his actions.

[73] No 12 was 19 years and nine months old at the time of Stevens' murder and 20 years and seven months old at the time of Browers' murder. He has given no honest explanation to explain his actions, so I have no evidence that he was immature and subjected to pressure. Nonetheless, he was in the company of No 11 who was older than himself. Earlier in the day, No 2, also older than him, was part of the group that travelled to and from Kalksteenfontein. On the basis of inherent probability, I am inclined to make some allowance for youthfulness at the time of Stevens' murder. I cannot, though, make the same allowance when it comes to Browers' murder. No 12 was 10 months older, and his experience in the brutal slaying of Stevens had not caused him to draw back from his association with violent people.

Appropriate sentences

[74] That the crimes were very serious hardly needs saying. Aggravating factors are that the accused used unlicensed firearms and ammunition to perpetrate the crimes and that they were brazenly committed in broad daylight in built-up areas. In the case of Browers' murder, I also regard as aggravation the fact that the accused exploited and bullied Stoffels into helping them commit the crime.

[75] There are no substantial and compelling circumstances, in No 11's case, to justify a departure from the prescribed life sentence on the two murder counts. In No 12's case, his youthfulness, coupled with the fact that he is before me as a first offender, is just sufficient to make a life sentence for Stevens' murder disproportionate, and for that crime I would sentence him to 25 years' imprisonment, which I would in turn reduce to 22 years on account of pre-sentencing detention. In the case of Browers' murder, however, and for reasons I have explained, I cannot find substantial and compelling circumstances justifying a departure from the prescribed life sentence.

[76] The attempted murder of Ms Undre is also a serious crime. Although she was not the intended victim, she was sitting in the front passenger seat, and the accused must have seen her. They shot at Browers in reckless disregard of the fact that his passenger was likely to be struck. I described her injuries in para 343 of my judgment. She sustained three bullet wounds to the upper part of her right leg and hip. She was in hospital for more than three weeks, undergoing two emergency operations on the day of the shooting and another one in February 2017. She has suffered permanent damage to her leg and walks with a limp. In the circumstances, I consider a sentence of 15 years' imprisonment for her attempted murder to be fully justified. I have already taken No 12's pre-sentencing detention into account. In No 11's case, I will reduce his sentence on this particular count to 14 years and six months because of his pre-sentencing detention These sentences will automatically run concurrently with the life sentences.

[77] Since the use of unlicensed firearms and ammunition is reflected in the sentences I am imposing, I will, as in early counts, impose more limited sentences for the unlawful possession of the firearms and ammunition – in each case five years' imprisonment for possession of the firearms and three years' imprisonment for possession of the ammunition. The sentences will automatically run concurrently with the life sentences. If I were convicting No 12 only on the counts relating to Stevens' murder, I would order the sentences for the possession of the firearm and ammunition to run concurrently with his 22-year sentence for Stevens' murder. For the avoidance of doubt, I shall include this in my order, though it may in the circumstances be redundant.

[78] In regard to these accused's conviction on count 2, what I have said regarding the position of No 1 and No 2 on the same count is equally applicable.

Conclusion

[79] I thus impose the following sentences:

(a) <u>No 1</u>:

(i) On count 2 the accused is sentenced to 3 years imprisonment.

(ii) On count 35 the accused is sentenced to life imprisonment.

(iii) On count 36 the accused is sentenced to 9 years and 8 months' imprisonment.

(iv) On count 71, the accused is sentenced to 9 years' imprisonment.

(b) No 2:

(i) On count 2 the accused is sentenced to 3 years' imprisonment.

(ii) On count 35 the accused is sentenced to life imprisonment.

(iii) On count 36 the accused is sentenced to 8 years and 10 months' imprisonment.

(iv) On count 71 the accused is sentenced to 12 years' imprisonment.

(c) No 9:

(i) On count 14 the accused is sentenced to 10 years' imprisonment.

(ii) On count 15 the accused is sentenced to 8 years' imprisonment.

(iii) On count 16 the accused is sentenced to 5 years' imprisonment.

(iv) On count 17 the accused is sentenced to 3 years' imprisonment.

(v) The sentences on counts 16 and 17, and seven years of the sentence imposed on count 15, will run concurrently with the sentence imposed on count 14, resulting in an effective imprisonment of 11 years.

(d) No 10:

(i) On count 59 the accused is sentenced to 9 years' imprisonment.

(ii) On count 60, the accused is sentenced to 7 years' imprisonment.

(iii) On count 61, the accused is sentenced to 6 years' imprisonment.

(iv) On count 62, the accused is sentenced to 3 years' imprisonment.

(v) The sentences on counts 60 and 62, and five out of the six years on count 61, shall run concurrently with the sentence on count 59, resulting in an effective period of imprisonment of 10 years.

(d) No 11:

(i) On count 2 the accused is sentenced to 3 years' imprisonment.

(ii) On count 55 the accused is sentenced to life imprisonment.

(iii) On count 57 the accused is sentenced to 5 years' imprisonment.

(iv) On count 58 the accused is sentenced to 3 years' imprisonment.

(v) On count 67 the accused is sentenced to life imprisonment.

(vi) On count 68 the accused is sentenced to 14 years and six months' imprisonment.

(vii) On count 69 the accused is sentenced to 5 years' imprisonment.

(vii) On count 70 the accused is sentenced to 3 years' imprisonment.

(e) No 12:

(i) On count 2 the accused is sentenced to 3 years' imprisonment.

(ii) On count 55 the accused is sentenced to 22 years' imprisonment.

(iii) On count 57 the accused is sentenced to 5 years' imprisonment.

(iv) On count 58 the accused is sentenced to 3 years' imprisonment.

(v) The sentences on counts 2, 57 and 58 shall run concurrently with the sentence on count 55.

(vi) On count 67 the accused is sentenced to life imprisonment.

(vii) On count 68 the accused is sentenced to 15 years' imprisonment.

(viii) On count 69 the accused is sentenced to 5 years' imprisonment.

(ix) On count 70 the accused is sentenced to 3 years' imprisonment.

(f) In terms of s 103(1) of the Firearms Control Act 60 of 2000, No 1, No 2, No 9, No 10, No 11 and No 12 are declared unfit to possess a firearm.

(g) In terms of s 34(1)(*c*) and 35(1) of the Criminal Procedure Act 51 of 1977, the drugs forming the subject of count 71 are forfeited to the State.

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O L Rogers

Judge of the High Court

Western Cape Division

APPEARANCES

For the State	Mr M N C Menigo
For accused No 1	Mr R Liddell
For accused Nos 2, 8, 11 & 12	Ms S Webb
For accused Nos 3, 4, 6, 7 & 9	Mr J Weeber
For accused Nos 5 & 10	Mr R McKernan